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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Marlin Johnson, Roy M. Mitchell, Robert Piper, and William O'Neal, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-169a)[1] is reported at 600 F.2d 600. A "Summary"

[1] "Pet. App." refers to the separately-bound appendix to this petition. "C.A. App." refers to the appendix to the brief filed in the court of appeals by respondents Anderson, Bell, Clark, Satchel, and Truelock. "Tr." refers to the trial transcript.

of the evidence at trial, prepared by the trial judge and submitted to counsel with an explanatory letter dated July 28, 1977 (Pet. App. 175a-221a), was treated by the court of appeals as the opinion of the district court (Pet. App. 11a n.4); it is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 233a-235a) was entered on April 23, 1979, and petitions for rehearing were denied on September 12, 1979 (Pet. App. 170a-171a). On December 3, 1979, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari until December 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, having determined only that directed verdicts should not have been entered in favor of petitioners and that the case should therefore be remanded for a new trial, the court of appeals erred in awarding attorneys' fees to respondents as "prevailing parties" under 42 U.S.C. 1988.

2. Whether the court of appeals' reversal of directed verdicts in favor of petitioners is inconsistent with the standard set forth in *Butz* v. *Economou*, 438 U.S. 478 (1978), for terminating constitutional tort actions in which federal officers' sworn denials that they engaged in non-immunized conduct are not squarely contradicted by other evidence in the record.

STATUTE INVOLVED

42 U.S.C. 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

1. In the early morning of December 4, 1969, police officers employed by or detailed to a "Special Prosecution Unit" in the State's Attorney's Office, Cook County, Illinois, entered a Chicago apartment occupied by nine members of the Black Panther Party (BPP) (Pet. App. 2a). The officers were acting pursuant to a warrant issued the previous day by the Cook County Circuit Court, authorizing them to search for and seize illegal weapons (*ibid.*). Shortly after the entry, gunfire erupted, killing Fred Hampton and Mark Clark, two of the apartment's occupants, and wounding four others (*id.* at 3a). The police seized 19 unregistered weapons, a stolen police gun, and a sawed-off shotgun (*id.* at 176a), and arrested the seven survivors on state criminal charges (*id.* at 31a).

This incident led to several state and federal investigations and legal proceedings. In January 1970, the seven survivors were indicted by a Cook County grand jury on charges of attempted murder and aggravated battery (Pet. App. 38a). A later examination of ballistics evidence by an FBI expert revealed, however, that, contrary to the findings made in December 1969 by a ballistics analyst employed by the Chicago Police Department, all but one of the identifiable bullets fired in the December 4 raid had been fired by police officers executing the warrant and none had been fired by any of the surviving occupants (*id.* at 40a-41a, 57a). The state indictments of the survivors were ultimately dismissed (*id.* at 43a). Meanwhile, in January 1970, a federal grand jury convened to inquire into possible civil rights violations began taking evidence (*id.* at 39a). The grand jury issued a report but returned no indictments prior to its discharge in May 1970 (*id.* at 39a-43a; see also *In re Johnson*, 484 F.2d 791 (7th Cir. 1973)). In June 1970, a special state prosecutor was appointed to investigate police and BPP actions on December 4. This investigation resulted in an indictment of some of the state defendants in the present action for conspiracy to obstruct justice. These defendants were acquitted after a bench trial in October 1972 (Pet. App. 43a).

2. In June 1970, respondents, the surviving occupants of the apartment and the legal representatives of Hampton and Clark (hereinafter referred to as "plaintiffs"), filed four civil damage actions (later

consolidated) in the United States District Court for the Northern District of Illinois against Cook County, the City of Chicago, certain of their officials and employees, and persons connected with the State's Attorney's Office, relating to the December 4 raid and its aftermath. After proceedings in the district court and the court of appeals resulted in dismissal of the complaint against some of the defendants (see *Hampton* v. *City of Chicago*, 339 F. Supp. 695 (N.D. Ill. 1972), aff'd in part and rev'd in part, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)), plaintiffs, in 1974, filed a second amended complaint naming as additional defendants three Chicago FBI agents (petitioners Johnson, Piper, and Mitchell) and an FBI informant (petitioner O'Neal) (hereinafter referred to jointly as "the federal defendants").[2]

Basing their claims on 42 U.S.C. 1983, 1985(3), and 1986, and on provisions of the Constitution, plaintiffs generally charged that the FBI agents intentionally or negligently deprived them of their civil rights by (i) conspiring with various state defendants to plan and carry out the December 4 search (Counts 1-4), (ii) failing to prevent false imprisonment of the surviving occupants (Count 7),

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[2] Petitioner Johnson was the Special Agent in Charge of the Chicago FBI office from 1962 to 1970. Petitioner Piper supervised the Racial Matters Squad in that office from March 1969 to June or July 1970. Petitioner Mitchell was assigned to the Racial Matters Squad from 1968 to the middle of 1970. Petitioner O'Neal reported to petitioner Mitchell.

(iii) conspiring to bring about plaintiffs' malicious prosecution on state criminal charges or failing to prevent it (Counts 8-10), and (iv) conspiring to obstruct justice by denying plaintiffs their Sixth Amendment right to counsel and impeding vindication of seven of them on the state charges (Count 11) (Pet. App. 7a-9a). Petitioner O'Neal was named in all the counts except seven through ten (*ibid.*). In addition, the federal defendants were charged under state law with the wrongful death of Hampton and Clark (Count 14) (*id.* at 9a).

Trial commenced on January 5, 1976. Plaintiffs introduced evidence relating to an FBI counterintelligence program known as COINTELPRO, having its origins in the 1950's, that consisted of covert actions directed at various domestic organizations, some violent, others not. In 1967 this program had been expanded to include certain militant black groups (Pet. App. 12a). Unlike the FBI's regular criminal investigation programs, in which exchanging law enforcement information with local agencies was an integral part of efforts to detect and prevent crime, COINTELPRO had an additional aim of disrupting and neutralizing the target organizations (*id.* at 12a-14a; see also *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess., Book III at 3 (1976)). Plaintiffs sought to suggest that the federal defendants had invidious motives to harm the BPP and its membership and that any actions taken by the federal defendants with

respect to the BPP were part of the COINTEL program.

Plaintiffs also called the federal defendants as witnesses to testify to their actions relating to the Chicago chapter of the BPP and, in particular, to petitioner Mitchell's having furnished to the State's Attorney's Office, before December 4, information about a floorplan of the Hampton apartment and about weapons stored in the apartment. The federal defendants' testimony established that this information, which was originally supplied by petitioner O'Neal to petitioner Mitchell, was given by Mitchell to the State's Attorney's Office (Pet. App. 19a-20a). However, the federal defendants denied that they joined in planning the December 4 raid or that they even knew about it in advance (Tr. 5036, 5404, 8222-8223, 9499-9503, 23968-23972). Two state defendants who allegedly met with petitioner Mitchell prior to the raid corroborated this testimony, one denying having received any communications from the FBI about the BPP and the other stating that he had obtained information from Mitchell about the Hampton apartment but had not told Mitchell he planned to seek a search warrant (Tr. 24794, 24798, 24988, 25014). Plaintiffs also introduced other evidence, principally memoranda written or approved by some of the federal defendants. Plaintiffs asserted that this evidence permitted inferences contradicting the federal defendants' express denials.[3] Plaintiffs also

[3] The portions of this evidence described and relied on by the court of appeals in reversing the district court's grant

introduced evidence (described at pages 15-16, *infra*) relating to actions of the federal defendants in connection with an investigation of the December 4 raid.

At the close of plaintiffs' case, about 16 months after trial began, the district court granted the motions of the federal defendants and certain other defendants for a directed verdict (Pet. App. 186a, 222a-230a).[4] Final judgment directing dismissal of the complaint as to all defendants was entered two months later, on June 20, 1977, after the jury deadlocked regarding the seven remaining defendants, the police officers charged with firing their guns in the Hampton apartment on December 4 (Pet. App. 186a-187a, 231a-232a).

In its "Summary" of the evidence at trial, the district court noted that there had been "numerous incidents in Chicago of armed violence involving members of the Black Panther Party" (Pet. App. 188a-189a). It also observed that dissemination by the FBI of investigative information about possible criminal activity to local law enforcement agencies was required by established lawful FBI regulations and directives (*id.* at 190a-191a). The court further noted that the federal defendants and members of

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of directed verdicts in favor of the federal defendants are set forth below in our summary of the court of appeals' opinion (pages 10-16, *infra*).

[4] Although the district judge later referred to his order granting these motions as an "unentered Order" (Pet. App. 173a), the record filed in the court of appeals indicates that the order was in fact entered on April 15, 1977.

the State's Attorney's Office had denied under oath the existence of any conspiracy to conduct an unlawful raid and that this direct testimony was not contradicted by any other evidence offered by plaintiffs (*id.* at 189a-191a).

3a. The court of appeals, in a 2-1 decision, reversed the directed verdicts as to the federal defendants and most of the other defendants (Pet. App. 1a-169a). The court discerned two possible conspiracies in the evidence presented by the plaintiffs (*id.* at 47a). The first was described as involving "the pre-raid preparations and planning, and the raid itself" (*ibid.*). (The search itself was characterized by the court as having deprived the apartment occupants of their civil rights because it was allegedly carried out on the basis of an invalid search warrant and because the officers executing the warrant allegedly used excessive force and committed unwarranted assaults on the occupants (*id.* at 57a, 84a-85a, 119a-120a).) The second conspiracy was described as "the alleged cover up of evidence regarding the instigation, preparation, and execution of the raid, and the post-raid legal harassment of the plaintiffs" (*id.* at 47a). In the court of appeals' view, the proof adduced against the federal defendants on both theories was sufficient to go to the jury. In his opinion for the panel majority, Judge Swygert set forth at some length (*id.* at 12a-43a) the record evidence that provided the "basis for [the court's] determination of the legal issues concerning the directed verdicts" (*id.* at 44a).

The court of appeals relied on evidence of the operation of the FBI's COINTEL program to supply proof of "class-based animus" against the BPP on the part of the federal defendants (Pet. App. 51a-52a). The evidence cited concerned both the aims of the program relating to "Black Nationalist Hate Groups" and the actions taken either by the Chicago FBI office, supposedly as part of COINTELPRO, or by petitioner O'Neal, possibly acting on his own (*id.* at 12a-17a). The national program included such objectives as preventing those groups from joining with each other or from engaging in violence (*id.* at 13a). Some actions of the Chicago FBI office and of petitioner O'Neal were apparently aimed at creating dissension between the BPP and such groups as Chicago youth gangs and the Students for a Democratic Society, and, if plaintiffs' evidence were credited, O'Neal personally may have encouraged the Chicago BPP to engage in violent and criminal activity (*id.* at 15a).

The court of appeals linked to these activities the fact that petitioner O'Neal had provided information that allowed local authorities to arrest Hampton on an outstanding warrant before he was to appear on a local television show; that the Chicago FBI office had received authorization for a warrantless electronic surveillance of BPP headquarters; and that in June 1969 Chicago FBI agents, in executing a fugitive arrest warrant, had conducted a search of BPP headquarters that resulted in the seizure of weapons and the arrest of some Black Panthers on charges (later dropped) of harboring a fugitive (Pet. App. 15a-

16a). Finally, the court noted that FBI officers were urged to develop working relationships with local law enforcement agencies both to aid in "the FBI's counterintelligence goals" and to provide information to such agencies in compliance with the FBI's established law enforcement mandate apart from COINTELPRO (*id.* at 16a).

The court of appeals referred to a series of actions between November 13 and December 4, 1969, in its discussion of the federal defendants' alleged participation in the conspiracy concerning the raid. Petitioner Mitchell showed petitioner O'Neal photographs of two Chicago policemen killed in a shootout on November 13, 1969, with a man connected with the BPP (Pet. App. 17a). On November 19, petitioner Mitchell, with petitioner O'Neal's aid, constructed a floorplan of the Hampton apartment that included information about who frequented the apartment and which bedroom was used by Hampton (*id.* at 17a-18a). At about this time, petitioner O'Neal gave petitioner Mitchell information concerning weapons in the apartment (*id.* at 18a). Petitioner Mitchell prepared a memorandum dated November 21, listing weapons in the apartment, but the list did not include a sawed-off shotgun and a stolen police gun, possession of which might have violated federal law (*ibid.*).[5] Petitioner Mitchell did not notify the

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[5] Petitioner Mitchell testified at trial, without contradiction, that he had dictated the weapons memorandum on November 19, after an initial telephone conversation with petitioner

Alcohol, Tobacco, and Firearms Division of the Treasury Department about these two guns (*ibid.*).

After November 19, petitioner Mitchell gave the floorplan and weapons information to both the State's Attorney's Office and the Gang Intelligence Unit (GIU) of the Chicago Police Department (Pet. App. 18a-20a). Petitioners Piper and Johnson also were aware that information was being given to the GIU (*id.* at 18a-19a). Shortly thereafter, petitioner O'Neal told petitioner Mitchell that the weapons had been moved out of the apartment in anticipation of a police raid (*id.* at 19a). When this information reached petitioner Johnson, he directed that it be relayed to all previously-notified local law enforcement agencies. He and Mitchell then called the GIU (*ibid.*). The GIU director confirmed that a raid had been planned, but told petitioner Johnson that it would be cancelled (*ibid.*). Between late November and December 4, petitioner Mitchell had between five and seven conversations with Richard Jalovec, Assistant State's Attorney in charge of the Special Prosecution Unit (*id.* at 19a n.12). On or about November 26, petitioner Mitchell told Jalovec that the weapons had been returned to the apartment, that some had been

O'Neal, and that it was in a second meeting with O'Neal later that day that he learned about the shotgun and the stolen police gun (Tr. 6824-6825, 6827-6831). Petitioner Mitchell testified further that he had asked petitioner O'Neal about the serial numbers on the guns, but O'Neal did not have this information or information about the barrel length of the shotgun (Tr. 6825) and that when Mitchell again asked O'Neal in late November about the serial numbers, O'Neal could not supply them (Tr. 7019-7020). This testimony was not referred to by the court of appeals.

illegally purchased, and that BPP members besides Hampton and his girlfriend Deborah Johnson frequented the apartment (*id.* at 19a).[6] On or about December 1, petitioner Mitchell told Jalovec that it appeared that the returned weapons included the sawed-off shotgun and the stolen police gun. Shortly thereafter, petitioner Mitchell met with Jalovec and Sgt. Daniel Groth, a police officer attached to the State's Attorney's Office, showed them the apartment floorplan, and told them that the BPP was expected to hold a political education meeting at a place other than the apartment on the evening of December 3 (*id.* at 19a-20a). Petitioner Piper had approved this exchange of information (*id.* at 20a).

Groth told Jalovec on December 3 that he had received information from another source similar to that supplied by petitioner Mitchell (Pet. App. 20a). Later that day Jalovec and Groth drafted a search warrant supported by an affidavit stating that each had received information from an unnamed reliable source that the Hampton apartment contained numerous weapons, including sawed-off shotguns (*id.* at 21a). Based on the affidavit, a Cook County Circuit Court judge issued a search warrant, which was executed at approximately 4:30 a.m. on December 4 by officers attached to the State's Attorney's Office (*id.* at 21a, 23a). Meanwhile, on December 3, 1969,

[6] Petitioner Piper testified without contradiction that he informed the GIU around this time that the weapons had been moved back to the apartment (Tr. 9362; see also C.A. App. D-24). This testimony was not referred to by the court of appeals.

petitioners Johnson and Piper approved a counter-intelligence memorandum stating that information about weapons in the Hampton apartment had been furnished to local law enforcement agencies and that the Chicago Police Department planned "a positive course of action" (*id.* at 22a; C.A. App. D-20 to D-21).

Petitioners Mitchell, Piper, and Johnson testified that they first learned of the raid on December 4 through the news media (Pet. App. 33a). Petitioner Mitchell, at petitioner Piper's direction, spoke with Jalovec and Groth to get the details, and Jalovec asked Mitchell if he would be concerned if it were generally known that Mitchell was the source of preliminary information used for the raid (*id.* at 33a-34a). Petitioner Johnson informed FBI headquarters that day about the raid (*id.* at 34a). Petitioner O'Neal continued to give the FBI information about the BPP (*ibid.*). On December 11, petitioner Piper wrote to FBI headquarters requesting a bonus for petitioner O'Neal because O'Neal had supplied information used for the raid that had not been available from other sources (*ibid.*; C.A. App. D-23), and on December 12, petitioner Mitchell wrote a memorandum for O'Neal's file stating that on December 1 or 2, the State's Attorney's Office had been informed that weapons, including "one sawed-off shotgun, exact length unknown, and a stolen riot police shotgun" were in the Hampton apartment (Pet. App. 34a; C.A. App. D-24).

After the federal grand jury had been convened (see page 4, *supra*), petitioner Johnson, as head of the Chicago FBI office, instructed the FBI case agent assigned to the grand jury to channel requests for evidence through him (Pet. App. 38a-39a). The case agent advised FBI headquarters that petitioner Johnson would testify before the grand jury, but not as to the circumstances of the December 4 raid, and that there would be no "exposure" for the FBI (*id.* at 39a). On February 11, 1970, petitioner Johnson, without prior consultation with petitioners Piper or Mitchell, did testify, stating that the Chicago FBI office had been unaware of the presence of *illegal* weapons in the apartment before the search. Petitioner Johnson was not asked about and did not mention any floorplan information supplied by petitioner Mitchell to Jalovec (*ibid.*). On the day that petitioner Johnson testified, petitioner Mitchell wrote FBI headquarters requesting authorization for continued payments to petitioner O'Neal as an informant, citing his having provided a floorplan and other information that might have saved those who executed the warrant on December 4 from " 'injury and possible death' " (*id.* at 39a-40a).

Petitioners Mitchell, Piper, and O'Neal did not testify before the grand jury, but the Racial Matters Squad, under Piper's supervision, supplied the grand jury case agent with information about the BPP. The case agent, however, was not given the floorplan or petitioner Mitchell's December 12 memorandum (Pet. App. 40a). An FBI expert, however, provided

the grand jury with an analysis indicating that the ballistics report used to support the state criminal charges against the surviving occupants of the apartment was in error (*id.* at 40a-41a). Jerris Leonard, the Justice Department official conducting the grand jury investigation, sought the testimony of both the "raiders" and the surviving occupants. He offered to give copies of the "raiders' " grand jury testimony to Edward Hanrahan, the Cook County State's Attorney, if Hanrahan would dismiss the state criminal charges against the BPP members; Leonard hoped that the latter would then agree to testify (*id.* at 41a-42a). Petitioner Johnson informed the case agent of this arrangement, and the agent sent the information to FBI headquarters, stating that federal indictments of police officers were not planned, that Hanrahan would receive the police officers' grand jury testimony, and that Hanrahan was planning to dismiss the state indictment because of the change in the ballistics evidence (*id.* at 42a & n.18). Plaintiffs refused to testify before the grand jury (*id.* at 43a).

b. The evidence summarized above represents the entire proof at trial relevant to the federal defendants that was relied on by the court of appeals in reaching its decision. The court of appeals held that this evidence was sufficient to permit submission of the conspiracy claims against the federal defendants to a jury. It acknowledged, however, that, with respect to the alleged raid conspiracy, the federal defendants could not be found to have violated plaintiffs' civil rights if they merely agreed to help the state defendants "enforce the law and prevent violence by the BPP" (Pet. App. 54a n.24). Similarly, Chief Judge Fairchild, whose vote was necessary for the court's judgment, noted in his concurring opinion that the lawfulness of the raid—and plaintiffs' entitlement to damages based upon it—turned solely upon the validity of the search warrant and the use of excessive force in executing it (*id.* at 119a-120a) and that a conspiracy "to discredit and hamper [the] BPP in its political activity" would not necessarily include within it a conspiracy to procure an invalid warrant or to execute the warrant using excessive force (*id.* at 120a). As to the federal defendants' liability arising from the raid, Chief Judge Fairchild observed (*ibid.*):

> The activity of the federal defendants in surveillance of a group from whom violent, unlawful conduct was expected, and in informing state officers of the floor plan and possession of weapons could be found to have been legitimate activity and cooperation in law enforcement, and not wrongful acts pursuant to a conspiracy, even though the jury also found a conspiracy to disrupt or discredit BPP politically. In my view, there could be no recovery of damages, arising from the raid, based solely on a conspiracy theory, unless the jury was satisfied that the unlawful raid or the use of excessive force in carrying out a lawful raid was within the objects of the conspiracy.

Regarding the basis for liability on the counts alleging that plaintiffs were damaged by a post-raid conspiracy, the court noted that petitioner Mitchell

had talked with Groth and Jalovec on the morning of December 4 and had left just before Hanrahan held a press conference about the raid (Pet. App. 63a), that the jury could find that certain of the federal defendants had acted to conceal evidence of their roles "in the planning of the raid," and that petitioner Johnson had been involved in the arrangement between Hanrahan and Leonard whereby the state criminal indictments were dismissed (*id.* at 63a-65a).

Finally, the court of appeals awarded plaintiffs their costs on appeal, including attorneys' fees, ostensibly under the authority of 42 U.S.C. 1988 (Pet. App. 104a-106a, 118a). These fees, which (as noted below; see page 21, note 10, *infra*) may exceed $1 million, are to be paid by "all nonprevailing defendants" (*id.* at 118a), including the federal defendants.[7]

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[7] The court also held that plaintiffs had been unduly hampered in presenting their case by the district court's tolerance of delays by the federal defendants in furnishing documents in response to plaintiffs' discovery requests. Judge Swygert would have directed the imposition of sanctions pursuant to Fed. R. Civ. P. 37(b)(2) against the federal defendants and their counsel (Pet. App. 101a). This direction was not included in the court's judgment, however, because Chief Judge Fairchild, in his concurrence, agreed only to recommend that the district court, on remand, consider imposing sanctions (*id.* at 121a). Judge Pell, although not agreeing that the federal defendants and their counsel had disobeyed discovery orders, joined Chief Judge Fairchild's view that the district court might consider sanctions on remand (*id.* at 138a-140a).

Judge Pell concurred in the court's opinion insofar as it affirmed portions of the district court's judgment (Pet. App. 138a).[8] He dissented as to the reversal of the directed verdicts except those respecting the use of excessive force by "the shooting officers" (*id.* at 152a, 153a). As to the federal defendants and the remaining state and city defendants, Judge Pell found no "basis for reasonable inferences that there was any kind of an agreement among them, express or implicit, to cause a raid to be made with the object of killing or wounding various Black Panther Party members" (*id.* at 152a), and he similarly found no basis for malicious prosecution charges against the federal defendants (*id.* at 156a). Moreover, in regard to the allegations that various defendants had obstructed post-raid investigations, Judge Pell found no harm to the plaintiffs and hence no basis for recovering damages (*id.* at 157a). Finally, with respect to attorneys' fees, Judge Pell agreed with the majority that fees might be allowed for appellate work, but because of his views on the merits, he would have awarded fees only "commensurate with the work involving the shooter defendants" (*id.* at 167a-168a).

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[8] The majority affirmed in whole or in part directed verdicts in favor of certain Chicago Police Department employees who had participated in post-raid police investigations (Pet. App. 118a).

On September 12, 1979, the court of appeals denied petitions for rehearing en banc by an equally divided vote (Pet. App. 170a-171a).[9]

REASONS FOR GRANTING THE PETITION

One of the principal functions of the Federal Bureau of Investigation involves the exchange of lawfully-acquired information about actual or proposed criminal activities with local law enforcement authorities. As plaintiffs' evidence at trial showed, that is all that occurred between the FBI and the State's Attorney's Office and the Chicago Police Department prior to and after the December 4 raid. In reversing the grant of directed verdicts for the federal defendants, the court of appeals' opinion threatens to discourage federal-state cooperation in law enforcement and disregards the clear direction in *Butz* v. *Economou*, 438 U.S. 478 (1978), that trial judges should be vigilant in disposing summarily of insubstantial damage claims against federal officials. Moreover, the court's ruling that plaintiffs are entitled at present to attorneys' fees as "prevailing parties" conflicts with the holdings of several other circuits. These are important issues that warrant this Court's review.

1. The court of appeals held that plaintiffs are "prevailing parties" within the meaning of 42 U.S.C.

[9] Chief Judge Fairchild and Judges Swygert and Cummings voted against rehearing. Judges Sprecher, Pell and Tone voted for rehearing on all issues "except as to the shooting policemen" (Pet. App. 170a). Judges Wood and Bauer disqualified themselves.

1988 and that they therefore are entitled to recover their attorneys' fees on appeal. Fee claims totalling approximately $1 million have already been filed in the court of appeals.[10] But plaintiffs have not yet prevailed on *any* aspect of their complaint. The court of appeals' judgment requires only that the case be remanded for a new trial. Should that remand be upheld and a new trial take place, plaintiffs may well lose. We submit that this reading of Section 1988 finds no support in the legislative history of the statute, conflicts with the decisions of other courts of appeals, and leads to substantial inequities by requiring defendants to finance what may be wholly baseless lawsuits against themselves.[11]

In the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (hereinafter "the Fees Act"), Congress amended 42 U.S.C.

[10] See "Application of James D. Montgomery for Assessment of Attorneys' Fees and Costs," filed May 29, 1979; "Petition for Approval of Bill of Attorneys' Fees and Costs" (with affidavits by five of plaintiffs' counsel), filed May 29, 1979; "Motion for Leave to File Supplementary Affidavits of Counsel for Attorneys Fees and Supplementary Bill of Costs" (with supplementary affidavits from three of plaintiffs' counsel), filed July 26, 1979; and "Supplementary Application of James D. Montgomery for Assessment of Attorney's Fees and Costs," filed August 1, 1979.

[11] The court of appeals' decision may also persuade litigants against seeking the dismissal of complaints or the entry of directed verdicts in close cases, for fear that a reversal on appeal would be accompanied by a large award of attorneys' fees. This result obviously would be contrary to the strong judicial and societal interest in expediting litigation.

1988 to permit a court to award a "prevailing party, other than the United States," a "reasonable attorney's fee" as part of its costs in "an action or proceeding [brought] to enforce" certain civil rights statutes, including 42 U.S.C. 1983, 1985, and 1986, the provisions involved here. Hence, in the present case, the court of appeals was authorized to award plaintiffs the attorneys' fees attributable to their appeal only if, by virtue of securing a partial reversal of the judgment granting directed verdicts and a remand for a new trial, plaintiffs had "prevailed" within the meaning of the Fees Act. The language and legislative history of 42 U.S.C. 1988 indicate, however, that plaintiffs are not "prevailing" parties entitled to an award of attorneys' fees in the posture of this case.

Plaintiffs have not "prevailed" in any substantial or meaningful sense. They have succeeded thus far only in obtaining a trial—a right they had at the time they filed their complaint. They have no more "prevailed" than has a plaintiff who successfully defeats a defendant's motion for a directed verdict. In either event, the case is merely allowed to go to the jury, which may reject all the allegations of the complaint.

To be sure, the pertinent House and Senate reports emphasize that the Fees Act was intended to permit the award of interim counsel fees *pendente lite* in some circumstances. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7-8 (1976). Both reports, however, illustrate appropriate interim awards by reference to two cases—*Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)—in which the parties to whom fees were awarded had established their claims on the merits, although a final order granting relief had not yet been entered. S. Rep. No. 94-1011, *supra*, at 5; H.R. Rep. No. 94-1558, *supra*, at 8.[12] Moreover, the Senate Report, in describing "especially appropriate" cases for interim awards, referred to cases "where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues" (S. Rep. No. 94-1011, *supra*, at 5) (emphasis added). Similarly, the House Report explained that an appropriate guideline for determining when to make an interim fee award in protracted litigation is the Court's statement in *Bradley* that the "entry of any order *that determines substantial rights of the parties* may be an appropriate occasion upon which to consider the propriety of an award of counsel fees * * *" (H.R. Rep. No. 94-1558, *supra*, at 8, quoting *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 723 n.28 (emphasis added)).

These clear indications that Congress intended interim awards of attorneys' fees under the Fees Act

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[12] Indeed, in *Bradley*, the plaintiffs had succeeded in having the defendant school board enjoined to disestablish its segregated school systems well before the time at which the Court indicated they could be considered "prevailing parties," *i.e.*, the date on which a plan for desegregating the schools was approved. 416 U.S. at 723-724.

to be limited to parties that have prevailed on the merits as to at least part of their claims are reinforced by the fact that the Fees Act was expressly patterned on the attorneys' fee provisions of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) and 2000e-5(k), and Section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973*l*(e). S. Rep. No. 94-1011, *supra*, at 2; H.R. Rep. No. 94-1558, *supra*, at 5. Prior to passage of the Fees Act, interim attorneys' fee awards under the Voting Rights Act had been made to plaintiffs who had succeeded at least in invalidating an unconstitutional electoral scheme, although a final constitutional plan had not been adopted. See, *e.g.*, *Ferguson* v. *Winn Parish Police Jury*, 528 F.2d 592, 599 (5th Cir. 1976); *Panior* v. *Iberville Parish School Board*, 498 F.2d 1232, 1237 (5th Cir. 1974). As to the Civil Rights Act of 1964, some interim attorneys' fee awards had been made to plaintiffs who had not proved discrimination, but, as the District of Columbia Circuit explained in an opinion devoted exclusively to the question of when a party may be said to have prevailed, those awards had been made without discussion. *Grubbs* v. *Butz*, 548 F.2d 973, 974 n.5 (D.C. Cir. 1976) (collecting cases). In *Grubbs*, decided three months before the Fees Act was passed, the court concluded that the plaintiff was not entitled to an attorneys' fee award under 42 U.S.C. 2000e-5(k) because she had prevailed only in establishing, on an interlocutory appeal, that the district court had erred

in dismissing her discrimination suit for failure to exhaust administrative remedies. As the court explained (548 F.2d at 976) (footnotes omitted):

> Since Congress was solicitous enough of the rights of innocent Title VII defendants to authorize awards of attorneys' fees in their favor, we cannot believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination. For all we now know, the defendants in this case may be entirely blameless. If attorneys' fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. While that prospect might be consonant with the goals of a statute authorizing fee awards to any party, we find it contrary to the purposes of one that provides for awards only to the party who prevails.

Other circuits considering interim attorneys' fee awards under the Fees Act or the statutory provisions on which it was modelled have reached the same conclusion. See, *e.g.*, *Bly* v. *McLeod*, 605 F. 2d 134, 137 (4th Cir. 1979); *Whiteside* v. *Gill*, 580 F. 2d 134, 139-140 (5th Cir. 1978); *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006, 1009 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979); *Sperling* v. *United States*, 515 F. 2d 465, 485 (3d Cir. 1975), cert. denied, 426 U.S. 919 (1976). In each of these decisions, the court of appeals, contrary to the Seventh Circuit in this case, refused to allow an award of attorneys' fees to a plaintiff who had

prevailed on an aspect of the case unrelated to a final determination of the merits. See also *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978) ("[W]hen a district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law."); *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F. 2d 861, 871 (8th Cir. 1977) (denying claim under Fees Act by plaintiffs who obtained preliminary injunction and successfully defended it on appeal).[13]

In the present case, therefore, where no court has ever determined that petitioners violated plaintiffs' legal rights,[14] the court of appeals erred in awarding

[13] In both cases cited by the court below to justify the award (Pet. App. 105a), those to whom fees were awarded had prevailed on the merits of a claim. Thus, in *Davis* v. *Murphy*, 587 F.2d 362 (7th Cir. 1978), fees for appellate work were awarded to plaintiffs who had won in the trial court and on appeal; and in *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977), the court of appeals held that the plaintiff-appellant had established racial discrimination "both as a matter of fact and law." 562 F.2d at 556.

[14] In his opinion for the court, Judge Swygert stated that, in reversing the directed verdicts, the court was "not passing on the ultimate validity of plaintiffs' claims" (Pet. App. 46a n.20). Moreover, Chief Judge Fairchild made clear that Judge Swygert's use of the term " 'prima facie' case" in referring to the evidence developed by plaintiffs should not be taken to mean that at "any stage of [the] case * * * the evidence compelled a verdict for plaintiffs unless rebutted" (*id.* at 119a). Should a new trial be held and plaintiffs prevail, they may, of course, file claims for attorneys' fees that include the work on this appeal.

attorneys' fees against petitioners under 42 U.S.C. 1988, notwithstanding that the fees were limited to work on appeal.[15]

2. In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court held that the absolute immunity accorded a federal officer in *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959), from tort claims alleging discretionary acts within the "outer perimeter of [his] line of duty" does not apply to damage actions in which a federal officer is alleged to have knowingly violated the plaintiff's constitutional rights. In actions alleging constitutional torts, federal officers, like state officers sued under 42 U.S.C. 1983, are entitled to only a qualified immunity unless the "special functions" of the officer are such that absolute immunity is essential to the proper conduct of his office. 438 U.S.

[15] Construing 42 U.S.C. 1988 to prohibit an award of attorneys' fees to a party who has not yet established a claim on the merits would also avoid a possible constitutional problem. The fee award, if found to be authorized, is likely to impose a substantial financial burden on each individual defendant. It is at least questionable whether requiring substantial fee payments by defendants against whom no legal violation has been proven is consistent with due process. See *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 363 (1978) ("A bare allegation of wrongdoing, whether by breach of fiduciary duty or otherwise, is not a fair reason for requiring a defendant to undertake financial burdens and risks [payment of a substantial sum to aid in providing notice to the plaintiff class] to further a plaintiff's case."); *Berland* v. *Mack*, 48 F.R.D. 121, 131-132 (S.D.N.Y. 1969) (requiring defendant in class action to bear the financial burden of notice to the class on grounds that defendant was accused of breach of trust by class representative "smacks of confiscation").

at 508. Under qualified immunity, a federal officer may not be held liable for actions taken within the scope of his office that violate a plaintiff's constitutional rights if the officer held a reasonable good-faith belief that his actions did not violate the plaintiff's rights. 438 U.S. at 497-498, citing *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974).

At the same time, however, the Court was concerned that its decision in *Butz* not allow plaintiffs alleging constitutional violations to subject to harassing and protracted litigation federal officers guilty of nothing more than the vigorous exercise of the duties of their office. The Court expressly reminded the lower courts and counsel (438 U.S. at 507-508; footnote omitted):

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U.S., at 250. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

The litigation in the present case was not terminated at the pretrial stage. Plaintiffs had full opportunity in 16 months of trial to demonstrate that the federal defendants, in their dealings with the state defendants, had engaged in conduct that exceeded the qualified immunity for good faith performance of their official duties.[16] At the end of plaintiffs' case the district court determined, after a painstaking review of the evidence, that the federal defendants' denials that they knew of or participated

[16] The court of appeals found that plaintiffs were denied a fair trial by what it characterized as delayed and obstructive responses by the federal defendants and their counsel to document subpoenas and discovery orders of the district court (Pet. App. 96a-100a). In fact, the documents were in the control of the FBI, rather than the individual defendants, and could be released only by its current employees under established procedures (see 28 C.F.R. 16.21 *et seq.*). Moreover, the district court, in denying plaintiffs' motion for the imposition of sanctions, stated that the federal defendants and their counsel "did at all times carry out the orders of the court to the best of their abilities" (Order of April 15, 1977, printed in the appendix to the brief of the federal defendants filed in the court of appeals, at F-150).

In any event, the prejudice to plaintiffs from the "obstructive" tactics of the federal defendants is far from apparent. Although the court of appeals pointed out that many volumes of the documents furnished by the federal defendants were not turned over until four to five months into the trial (Pet. App. 99a-100a), the court failed to note that this was nearly a year before plaintiffs closed their case. The court of appeals also mentioned (*id.* at 98a n.43) that in March 1977 the district court refused to allow plaintiffs to recall petitioners Johnson and Mitchell to re-examine them on the basis of documents turned over after they had left the stand. Yet when plaintiffs sought to recall these witnesses in March 1977, they did not suggest what specific subject they wished to inquire further about; rather, they simply voiced an unparticularized complaint that they were "being harmed" by the court's ruling (Tr. 28647).

in any plan "to violate plaintiffs' constitutional and statutory rights" either before, during, or after the events of December 4, 1969, "were uncontradicted and unimpeached by any testimony whatsoever" (Pet. App. 189a-190a).

The court of appeals agreed that if the federal defendants had done no more than what they said they did—that is, contributed to, engaged in, or approved the transmission of information about the BPP to local law enforcement agencies, including the State's Attorney's Office—they could not be held liable for the outcome of the raid, whatever its legality (Pet. App. 54a n.24, 119a-120a). The court of appeals reversed the district court's judgment, however, because of its determination that the evidence summarized in its opinion was sufficient to present a jury issue whether the federal defendants had, contrary to their denials, joined in a plan to raid the BPP apartment with an unlawful search warrant and by use of excessive force and, afterwards, to cause or knowingly acquiesce in a malicious prosecution of the survivors on baseless state criminal charges.

We submit that none of the evidence cited by the court of appeals contradicts the federal defendants' sworn denials. In view of the proof that exchanges of information between the FBI and local law enforcement agencies took place on a regular basis, it is not surprising that such exchanges would have occurred in the days immediately preceding the December 4 raid. And although various memoranda might raise

suspicions in some minds concerning the degree of connection between the federal and state defendants, suspicions and conjecture are no substitute for evidence and no basis on which to allow a jury to return a verdict imposing damages liability. As Judge Pell observed (Pet. App. 153a), plaintiffs simply failed to produce any "hard basic reasonable inference-creating facts." In short, had the federal defendants reduced their testimony to affidavits, and had the plaintiffs countered with nothing more than what they produced at trial, the defendants would have been entitled under *Butz* to entry of summary judgment. See *Maiorana* v. *MacDonald*, 596 F.2d 1072 (1st Cir. 1979) (affirming summary judgment in favor of state police officers alleged to have negligently or in bad faith used deadly force in arresting plaintiff's son, where facts creating inferences possibly supporting plaintiff's theory could also be reconciled with the officers' accounts of their actions). The district court was therefore correct in granting the federal defendants' motions for directed verdicts.

The court of appeals' reversal, based on its notion that a jury might not credit the federal defendants' denials of improper conduct, will subject several federal officers to what is likely to be a lengthy second trial. We believe that the court's action fails to take sufficient account of the policy that underlies the doctrine of official immunity and that impelled this Court in *Butz* v. *Economou*, *supra*, to stress its expectation that the lower courts would quickly dismiss insubstantial and unsupported complaints. The

decision of the court of appeals makes apparent the need for further guidance to the lower courts on the question whether plaintiffs may defeat a defense of qualified official immunity by relying on evidence that does not contradict a federal officer's sworn denials that he engaged in conduct exceeding the bounds of that immunity but that is merely susceptible to inferences inconsistent with those denials as well as to inferences consistent with them. Ultimately this is a question of how much weight is to be given the objective of assuring that federal officers will not be intimidated by the threat of protracted litigation from carrying out their lawful duties with thoroughness and vigor.[17] It is therefore a question of substantial public importance that warrants this Court's review.

[17] The court of appeals' decision is likely to give pause to other federal law enforcement officers charged with supplying reliable and lawfully-acquired information about criminal activities to local law enforcement agencies over which they exercise no control. As Judge Pell noted in dissent, the result of the decision below could well be "a potentially disastrous curtailment on necessary exchanges of information between law enforcement * * * agencies" (Pet. App. 153a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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